REPORT OF THE LAW REFORM COMMITTEE

ON THE

HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 2005

SINGAPORE ACADEMY OF LAW

LAW REFORM COMMITTEE

MARCH 2013

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About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

About the Report

See Executive Summary below.

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I. Executive Summary

1 The objective of the Hague Convention on Choice of Court Agreements 2005 is to promote international trade through judicial co-operation by the mutual enforcement of choice of court agreements and the recognition and enforcement of the resulting judgments. Its practical objective is to create an international regime for litigation to replicate that which currently exists for international commercial arbitration, to provide commercial parties with more choices for resolving cross-border disputes. Currently, many commercial parties prefer arbitration to litigation because of the wide enforceability of the awards under the New York Convention (because of the large number of signatory states), while the enforceability of court judgments is subject to national law, which can vary considerably from country to country.

2 Currently, the only parties to the Convention are Mexico, the United States, and the European Union. It has not come into force yet.

3 The general scheme of the Convention is broadly similar to the common law which applies in Singapore. An exclusive choice of court agreement will be given effect to by Contracting States in terms of jurisdiction and enforcement. A chosen court must hear the case unless the clause is void. A non-chosen court should not hear the case unless there are highly exceptional circumstances. A judgment from a chosen court in a Contracting State will be recognised and enforced in other Contracting States, subject to defences which are broadly similarly to common law defences. How a Singapore court will approach an exclusive choice of court clause and the effect of a resulting judgment from a foreign chosen court will be similar, whether it is a Convention case or under the common law.

4 However, there are a number of significant differences between the Convention and the common law regime. First, while the choice of court clauses come in a wide variety in the common law, only a narrowly defined *exclusive* choice of court clause (an express bilateral stipulation designating a single Contracting State) is caught by the Convention. Moreover, a clause is presumed to be *exclusive* (ie, to exclude recourse to other courts) unless the parties clearly indicated otherwise, while it is an issue of construction of the terms of the contract under the common law. Secondly, the validity of the choice of court is tested by the law governing the agreement under the common law, but under the law to be applied by the chosen court under the Convention. Thirdly, the limited flexibility which a chosen court has not to hear a case under the common law is not replicated under the Convention. Fourthly, it is quite likely that there will be less flexibility to exercise jurisdiction by a non-chosen court under the Convention than under the common law. Fifthly, while a foreign court's decision on the validity of the choice of court clause will not be conclusive under the common law which will apply its own test, such a determination will be conclusive under the Convention.

5 There are clear potential benefits to Singapore in adopting the Convention. These include:

(a) Businesses potentially stand to gain from greater certainty in the enforcement of choice of court agreements and wider enforceability of resulting judgments. Multinational businesses stand to gain from lower transaction costs due to harmonisation of legal regimes, and direct enforceability of Convention judgments.

(b) Singapore stands to gain from potential wider enforceability of its court judgments and the facilitation of enforcement of its judgments in Convention countries which otherwise would not recognise Singapore judgments. It can signal its commitment to the development of a new international legal regime for resolution of cross-border commercial disputes. If more complex cross-border commercial cases are attracted to the Singapore courts, then Singapore stands to gain further opportunities to develop its own commercial law as well as to contribute to international law jurisprudence on the interpretation of the Convention.

6 On the other hand, there are also clearly costs involved. These include:

(a) Costs of educating the legal profession about the distinction between the common law and the Convention, in particular the Convention meaning of "exclusive" choice of court and its presumption of exclusivity.

(b) Complexity costs of maintaining dual regimes for the enforcement of choice of court agreements and the recognition and enforcement of foreign judgments.

(c) Uncertainty costs arising from the need for interpretation of a new Convention, as well as its interface with the common law.

(d) Loss of some judicial flexibility in dealing with exclusive choice of court agreements at both the jurisdiction and foreign judgments stages.

(e) Additional business costs may arise as a result of relatively weaker bargaining position of some enterprises.

7 The prevailing view in the Law Reform Committee was that adopting the Convention does not bring significant practical benefits to Singapore at least for the moment, and it recommended a wait and see attitude instead.

II. Introduction

8 The Hague Convention on Choice of Court Agreements 2005[1] ("Convention") was the product of the Hague Conference on Private International Law. After a highly ambitious attempt to harmonise global rules on jurisdiction and judgments generally was aborted because of fundamental differences of approaches between civil law and common law countries, it was thought that it would be more feasible to get a broader consensus on a more focussed project on the effect of choice of court agreements. There is an Explanatory Report ("Explanatory Report") which accompanies the Convention.[2] It is not an official part of the Convention, but the negotiations processes clearly contemplated that courts in Contracting States will refer to this document in the interpretation of the Convention.[3]

9 Presently, only the European Union, the United States, and Mexico have signed or acceded to the Convention.[4] The Convention has not entered into force in any country. Other countries are in the process of internal consultations as to whether they should be party to the Convention. Singapore is not a party to the Hague Conference, but the Convention is open to all countries to sign. The Convention will come into force in Contracting States only after the deposit of the second instrument of ratification, acceptance, approval or accession.[5] Mexico is the first and only country to have done so.[6]

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1 (2005) 44 International Legal Materials 1294. Full text can be found at: http://www.hcch.net/index_en.php?act=conventions.text&cid=98, accessed on 23 March 2013. An outline may be found at: http://www.hcch.net/upload/outline37e.pdf, accessed on 23 March 2013.

2 Trevor Hartley & Masato Dogauchi, *Explanatory Report* (HCCH Publications, 2005), available at: http://www.hcch.net/index_en.php?act=publications.details&pid=3959&dtid=3, accessed on 23 March 2013.

3 Another useful reference work is Ronald A Brand and Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (New York: Cambridge University Press, 2008) ("Brand & Herrup").

4 http://www.hcch.net/index_en.php?act=conventions.status&cid=98, accessed on 23 March 2013. The implementation process for the US has proved to be difficult because of the federal-state structure and there is dispute whether state or federal legislation is more appropriate (compare Curtis R Reitz, "Globalization, International Legal Developments, and Uniform State Laws" (2005) 51 Loyola Law Review 301 with Stephen B Burbank, "Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States" (2006) 2 Journal of Private International Law 287. It appears that a mix of federal and state level implementation will be likely: Daniel HR Laguardia, Stefan Falge & Helena Francesci, "The Hague Convention on Choice of Court Agreements: A Discussion of Domestic and Foreign Points" (2012) 80 United States Law Weekly 1803. The EU is working out the interface between the Convention and the Brussels I Regulation which governs the allocation of jurisdiction within the European Union.

5 Article 31. Unless otherwise indicated, all article references are to the Convention.

6 http://www.hcch.net/index_en.php?act=conventions.status&cid=98, accessed on 23 March 2013.

III. The Objectives of the Convention

10 The broad purpose of the Convention is to promote international trade through judicial co-operation in the form of mutual enforcement of choice of court agreements and recognition and enforcement of judgments resulting from the chosen court pursuant to the parties' choice. It recognises the importance to international commerce of party autonomy in the choice of dispute resolution process and venue, and aims to give wide effect to choice of court clauses.

11 More specifically, it aims to create a legal regime that will do for court judgments what the New York Convention has done for arbitral awards. One major reason that parties prefer international arbitration to court adjudication is the wider scope of enforceability of the resulting award compared to court judgments. While the recognition and enforcement of foreign judgments will depend on the private international law of the recognising/enforcing state and the content of such rules can vary considerably from state to state, states which are party to the New York Convention apply uniform rules to recognise arbitral awards from other New York Convention states. By creating a global system for the taking of jurisdiction and the recognition and enforcement of the resulting judicial orders, the Convention hopes to present commercial parties with more viable options for dispute resolution beyond arbitration. It is not intended to undermine arbitration, but by making litigation a more practically realistic dispute resolution option, it hopes to present commercial parties with a wider range of options.

12 A choice of court agreement (or jurisdiction agreement) is an agreement between contracting parties that certain or all disputes should be adjudicated by the court of a chosen country. The choice of court agreement is one type of dispute resolution agreement. Other types include arbitration and mediation agreements.

13 The Convention effects a scheme that is broadly similar to the *status quo* at common law. Basically it directs that the chosen court in a contracting state should not decline jurisdiction, and a non-chosen court in a contracting state should not take jurisdiction unless the clause was invalid, or unless there are exceptional circumstances present. It further directs that the resulting judgment from a chosen court of a contracting state can be recognised or enforced (subject to defences which are broadly similar to common law defences) in another contracting state.

14 The position at common law is outlined before the scheme of the Convention is examined, for comparative purposes.

IV. The Common Law Position

A. Choice of Court Agreements

15 A choice of court clause is an agreement between contracting parties that certain or all disputes between themselves should be adjudicated by the court of a chosen country. The choice of court agreement is a type of dispute resolution agreement. Other types include arbitration and mediation agreements.

16 Under the common law, choice of court agreements are generally enforced as contracts. However, the issue whether the court will ultimately exercise its jurisdiction is one of procedure governed by the law of the forum. Thus, while the question of jurisdiction ultimately a procedural one, heavy reliance is placed on contractual principles in the common law approach to choice of court agreements.[7]

17 Generally, a choice of court agreement may be exclusive or non-exclusive. A choice of court agreement may specify a permissible venue for adjudicating a dispute. As it does not prohibit the use of other venues, it is a *non-exclusive* choice of court agreement. Such a choice of the Singapore court will confer jurisdiction on the Singapore court, allowing service of writ on the defendant in Singapore where so provided in the contract, or outside Singapore if necessary under Order 11 of the Rules of Court. The distinguishing feature of an *exclusive* choice of court agreement is that it specifies or implies that disputes shall not be brought anywhere else but to the chosen court.

18 The validity and interpretation of a choice of court agreement are governed by the law governing the choice of court agreement, which is usually the law governing the main contract if (as is usually the case) no separate law is chosen to govern the choice of court clause. Where the common law governs the question, the modern approach to the construction of contracts apply, and the courts take the view that generally commercial parties prefer a one-stop venue for their dispute resolution. Thus broad scope is generally given to choice of court clauses. Whether a choice of court clause is exclusive or not is also a question of interpretation; there is no presumption either way.

19 Further, the common law is gradually developing the doctrine of separability of the choice of court clause; thus challenges to the main contract itself would not generally affect the dispute resolution clause, and the dispute resolution clause must be specifically impugned.

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7 See generally TM Yeo, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306

20 In the common law, a choice of court agreement may be unilaterally exclusive only, ie, one party has agreed not to bring the dispute anywhere else but in the chosen court, but the other party has not made any such promise. The unilateral promise in such an agreement has the same contractual effect as a bilateral promise.

B. Effect of Choice of Court Agreement on Jurisdiction

21 Generally, at common law, the court will give effect to the exclusive choice of court by exercising jurisdiction in the case of an exclusive choice of Singapore court, and by refusing to exercise its jurisdiction in the case of an exclusive choice of foreign court, unless exceptional circumstances amounting to strong cause can be demonstrated by the party seeking to breach the contract. This is a different test from the normal natural forum test where the balance of convenience plays a larger role.

22 In the case of an exclusive choice of Singapore court agreement, in general an anti-suit injunction to restrain the commencement or continuation of foreign proceedings may also be readily obtained from the Singapore court, unless the party seeking to breach the choice of court agreement can demonstrate exceptional circumstances amounting to strong cause. It would generally be easier to obtain an injunction in this type of situation than in the situation where the applicant is seeking an injunction to restrain the defendant from legal proceedings abroad on the basis that Singapore is the natural forum and the conduct abroad is vexatious and oppressive. International comity plays a lessened role where the parties have contractually agreed not to start proceedings elsewhere than the chosen forum.[8]

23 Under Singapore law, a choice of court clause that is otherwise contractually valid may not be given effect to if to do so would contravene any overriding mandatory law or fundamental public policy. There is no known instance of the latter. However, a choice of court clause may not be given effect to where to do so would go against parliamentary intention that certain international standards should be applied to certain types of contracts (eg, the Hague-Visby rules under the Carriage of Goods Act).[9] A choice of court clause may in some circumstances amount to an exclusion or limitation clause under the Unfair Contract Terms Act.[10] This Act could apply as the substantive law governing the clause if it is governed by Singapore law, or in some cases as overriding mandatory rule of the forum irrespective of the governing law.[11]

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8 *Ashlock William Grover v SetClear Pte Ltd* [2012] 2 SLR 625.

9 *The Epar* [1984-1985] SLR 409.

10 Cap 396, 1994 Rev Ed.

11 Ibid, section 27(2).

24 There may be further contractual consequences. In English law, damages for expenses incurred in staying foreign proceedings commenced in breach of contract have been recovered,[12] and presently the English bar appears generally to assume that substantial damages may also be obtained for the breach of a choice of court agreement.[13] The recent decision of the highest Spanish court[14] allowing substantial damages for breach of a jurisdiction agreement within the context of the jurisdiction regime of the European Union may encourage the English courts in this development generally.

25 The effect of non-exclusive choice of court agreement potentially raises complex issues, and the consequences are sometimes the same as if it were an exclusive choice of court agreement. For present purposes, it suffices to state there is likely to a question of what the parties have actually agreed to in the contract, and on the other the question of the weight to be assigned to the clause in the context of the exercise of balancing factors in the natural forum doctrine.[15]

26 Whether a choice of court agreement exists or not can raise a vexed conflict of laws question if the issue is in dispute. If the existence of the main contract is not in dispute, then in most cases, the problem is resolved by the application of the proper law of the contract to determine whether the contract contains the choice of court clause. Where the main contract is itself in dispute, or where the proper law of the contract is in dispute, there is a question as to the law applicable to determine the existence of the choice of court clause. Under the common law, it is not clear whether the correct approach is to first determine the existence of the contract and its proper law, and then apply the proper law to determine whether the choice of court clause is part of the contract (ie, approach the problem as two issues in sequence: formation of the main contract, and then incorporation of the jurisdiction clause), or to determine whether the main contract exists with or without the choice of court clause (ie, approach the problem as one issue of formation), and it may well be that there is no universal approach. On the choice of law for formation, it is unclear whether the applicable law is the law of the forum or the law that would govern the contract if the contract is valid (proper law of the putative agreement),[16] though the Court of Appeal in Singapore has suggested that it is the latter.[17]

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12 *Union Discount Co Ltd v Zoller* [2002] 1 WLR 1517 (CA); *Sunrock Aircraft Corporation Ltd v Scandinavian Airlines System Denmark-Norway-Sweden* [2007] EWCA Civ 882 at [37].

13 See also *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425 (HL) at [48].

14 STS (Sala de lo Civil, Sección 1a), sentencia núm. 6/2009 de 12 Enero. RJ 2009\544 (Supreme Court, Spain).

15 *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519.

16 For a recent survey of the arguments, see Kelvin Low, "Choice of Law in Formation of Contracts" (2004) 20 Journal of Contract Law 167.

17 *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR 543 (CA) at [30].

27 In a common law court, it is possible for a party to waive compliance with a choice of court agreement by an unequivocal and unambiguous act,[18] eg, by voluntarily going into the merits of the case in spite of an exclusive choice of foreign court agreement. There has been little discussion of whether this is an issue of procedure governed by the *lex fori*, or whether this is an issue of substantive contract law governed by the proper law of the contract. The effect of the waiver is that the court will consider the issue of the exercise of jurisdiction as if there had been no choice of court agreement.

C. Effect of Choice of Court Agreements on Foreign Judgments

28 A foreign judgment may be recognised in Singapore if the judgment meets certain requirements. The judgment must be from a court of law with competent jurisdiction, the order is final and conclusive under the foreign law, and the decision was on the merits of the case. The foreign court must have international jurisdiction over the party sought to be bound under the private international law of Singapore. International jurisdiction is established if the party sought to be bound was present or resident in the foreign jurisdiction at the time the foreign proceedings commenced, or had submitted or agreed to submit to the jurisdiction of the foreign court. A choice of court agreement, whether exclusive or non-exclusive, amounts to an agreement to submit to the jurisdiction of the foreign court. The purpose of recognition is to create an issue or cause of action estoppel, and either party to the judgment may use the foreign judgment for this purpose. The purpose of enforcement is for the judgment creditor to obtain the judgment sum from the judgment debtor without suing on the cause of action again. For the purpose of enforcement, a foreign judgment must meet the criteria for recognition, and must in addition be for a fixed or ascertainable sum of money. The recognition or enforcement of a foreign judgment is subject to certain defences, principally, fraud, the contravention of fundamental public policies and international mandatory rules of Singapore, estoppel from prior conduct or prior judgments, and breach of natural justice.

29 Enforcement of foreign judgment may be by suing on the judgment as a debt at common law, or by registration under the Reciprocal Enforcement of Commonwealth Judgments Act[19] ("RECJA") (for gazetted Commonwealth countries) and the Reciprocal Enforcement of Foreign Judgments Act[20] ("REFJA") (for countries so gazetted – so far only Hong Kong SAR). These statutory regimes only simplify the enforcement process, the substantive principles for recognition and enforcement under these regimes are very similar to those at common law. Registration of foreign

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18 See *The Vishva Apurva* [1992] 2 SLR 175 (CA) at 185 and *The Jian He* [2000] 1 SLR 8 (CA) at [47]-[50]. See also *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 in the context of arbitration agreements.

19 Cap 264, 1985 Rev Ed.

20 Cap 265, 2001 Rev Ed.

judgment allows for the foreign judgment to be executed as if it were a Singapore judgment, thus obviating the need to sue separately on the debt.

30 Whether a foreign judgment is enforced through the common law or by registration, a contractual choice of court agreement selecting the court from which the foreign judgment originated has the same effect that the parties have submitted to the jurisdiction of the foreign court. International jurisdiction is established by the agreement to submit to the jurisdiction of the foreign court.

31 It is a moot question whether a foreign judgment obtained in breach of an exclusive choice of court agreement is enforceable at common law by the party in breach. The RECJA is silent on this question, but there is a judicial discretion to disallow registration where it is not just and convenient to do so.[21] The REFJA specifically prohibits the registration of such a foreign judgment.[22] In the UK, there is specific legislation creating this defence for foreign judgments not falling within the European jurisdiction regime.[23]

D. Summary of the Common Law

32 In summary, the Singapore common law position on the effect of choice of court agreements is generally aligned with other common law jurisdictions. Party autonomy is given serious effect, both at the point the decision on jurisdiction as well as the point of the enforcement of foreign judgments.

33 At the jurisdiction stage, an exclusive choice of court agreement, provided it has not been waived, will be given effect to unless exceptional circumstances amounting to strong cause is demonstrated by the party seeking to breach the contract. It may also be given effect to by an injunction to restrain a party from carrying on foreign proceedings in breach of an exclusive choice of Singapore court unless strong reasons are shown otherwise.

34 Because of the strong contractual flavour in the way the common law approaches choice of court agreements,[24] some distinctive features of the common law are:

(a) the validity, meaning and scope of a choice of court clause (including whether it is exclusive or not) are determined by the proper law of the choice of court agreement;

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21 Note 20 above, section 3(1).

22 Note 19 above, section 5(3)(b).

23 Civil Jurisdiction and Judgments Act 1982, c 27, section 32.

24 See generally, Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford: OUP, 2008).

(b) where the common law governs the issue, the meaning of the clause is a question of construction and there is no presumption either way whether the clause is exclusive or non-exclusive;

(c) in principle, there is no difference in the effect of a choice of court clause whether the Singapore court or a foreign court has been chosen;

(d) an injunction may be sought to restrain the breach of a choice of court agreement at least where Singapore is the chosen court;

(e) damages may be sought for breach of a choice of court agreement;

(f) just as the common law of contract does not differentiate between different classes of contracts (eg, consumer contracts, employment contracts), neither do the common law principles relating to the effect of a choice of court agreement;

(g) there is some uncertainty whether a foreign judgment obtained in breach of a choice of court agreement is enforceable in Singapore (except where the judgment is from Hong Kong SAR in which case it is a defence).

V. The Scope of the Convention

35 Unlike the common law, the Convention does not apply to *all* choice of court agreements. It is limited in a three basic ways.

36 First, it does not apply to cases which are not "international", ie, where the parties are resident in the same contracting state and the relationship of the parties and all other elements relevant to the dispute (other than the choice of court clause) are connected only to that same state.[25] The common law, on the other hand, does share this concept of an "international" contract.

37 Secondly, the Convention only applies in "*civil and commercial*" matters.[26] This is not defined in the Convention, but the phrase is clearly borrowed from European instruments where it has received a very broad interpretation. It applies even if one of the parties is a state, but claims of an administrative law nature will not be included.

25 Article 1(2).

26 Article 1(1).

38 Thirdly, the Convention only applies where there is an *exclusive* choice of court agreement which designates a court in a Contracting State.[27] However, it is of some importance, as noted below, that "exclusive" under the Convention has a different meaning from the common law.

39 In addition, the Convention specifically excludes a wide range of contracts, including consumer and employment contracts, family and succession issues, carriage of persons and goods, competition matters, claims for personal injury, rights *in rem* in immovable property, validity and infringement of property rights other than copyright and related rights, and arbitration proceedings.[28]

40 The Convention does not apply to interim measures.[29]

41 A Contracting State may also make a declaration to exclude specific matters where it has a strong interest in not applying the Convention to that matter.[30] The state is required to ensure that the exclusion is no broader than necessary and the exclusion is clearly and precisely defined. Where such a declaration is made, the matter is reciprocally excluded from the application of the Convention when an exclusive choice of court agreement designates the declaring State. None of the three signatories (EU, US and Mexico) has made a reservation under this provision.

VI. The Scheme of the Convention

A. Jurisdiction

42 The Convention is mandatory once applicable. Parties may not opt out of it. This does not present a serious practical difficulty as their autonomy lies in the appropriate drafting of the choice of court clause.

43 In contrast to the common law which requires no formalities, there are formal requirements for the choice of court agreement under the Convention, but they are very basic. The agreement may be in writing, or be by any means of communication which

27 Article 3(a).

28 Article 2.

29 Article 7. This has the effect of excluding interim orders from the recognition and enforcement scheme. Similarly, under the common law, a foreign judgment needs to be final and conclusive on the merits of the case to be recognised.

30 Article 21.

renders the information accessible so as to be usable for subsequent reference.[31] It clearly includes electronic records.

44 An exclusive choice of court clause found within a contract will be treated as independent of the contract.[32] This is consistent with trends in the common law.

45 The basic jurisdictional scheme of the Convention is similar to the common law approach:

(a) The chosen court in a Contracting State must hear the case unless the clause is null and void;[33]

(b) A non-chosen court in a Contracting State should not hear the case, unless:[34]

i. The clause is null and void;[35]

ii. The parties lacked capacity;[36]

iii. It would lead to manifest injustice or would contravene forum public policy to do so;[37]

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31 Article 3(c).

32 Article 3(d).

33 Article 5. The chosen court is expected to apply its own law to the question. This is generally understood to mean its private international law: Explanatory Report, note 2 above, paras 3 and 125; Brand & Herrup, note 3 above, at pp 80-81; Paul Beaumont & Burcu Yüksel, "The Validity of Choice of Court Agreements under the Brussels I Regulation and the Hague Choice of Court Agreements Convention" in Katharina Boele-Woelki, Talia Einhorn, Daniel Girsberger & Symeon Symeonides (eds), *Convergence and Divergence in Private International Law: Liber Amicorum Kurt Siehr*" (Eleven, 2010) 563 at 575. There may be a separate issue as to the *existence* of the agreement as a matter of fact; the Convention does not appear to regulate this question, and it may well be governed by the law of the forum: Brand & Herrup, note 3 above, at p 79.

34 Article 6.

35 Article 6(a). There is some uncertainty surrounding the meaning of "null and void" which is intended to bear an autonomous meaning. The content of this phrase is assumed by commentators to be defined by the private international law of the chosen court: Explanatory Report, note 2 above, at paras 4 and 149; Brand & Herrup, note 3 above, at p 90. A separate argument may be mounted that the agreement does not *exist* as a matter of fact; this may be governed by the law of the forum since the Convention does not address this issue: Brand & Herrup, note 3 above, at p 79.

36 Article 6(b). This is stipulated to be tested by the "court seised" (the *lex fori*, presumably its choice of law rule). To the extent that lack of capacity may render the clause null and void, the law of the chosen court would also apply. Further, recognition or enforcement may be refused if capacity is lacking under the (choice of law) rule of the state in which the recognition or enforcement is sought (Article 9(b)).

37 Article 6(c). No choice of law is specified. As these issues are founded on public policy, the applicable law will presumably be the *lex fori*, subject to the consideration that it is dealing with an international case.

iv. There are exceptional circumstances such that it is not reasonable for the choice of court agreement to be performed;[38] or

v. The chosen court has decided not to hear the case.[39]

B. Judgments

46 The Convention provides for the recognition and enforcement of the judgment from the chosen court in other Contracting States. A judgment from a chosen court in a Contracting State will be recognised or enforced in other Contracting States,[40] subject to defences which are broadly similar to those in the common law.[41]

47 However, the possibility that the defences under the Convention may receive different interpretation from the common law cannot be ruled out. A notable point is that the recognition or enforcement may be refused to the extent that the foreign judgment for damages awards non-compensatory damages.[42] The common law position in Singapore law is unclear, but English and Canadian authorities have allowed enforcement of foreign punitive damages while Australian authorities have taken a more cautious approach that requires some equivalence with what an Australian court would have been prepared to award.

48 Further, a Contracting State may by declaration extend the scope of the recognition and enforcement provisions to a judgment of the court of another Contracting States designated in a *non-exclusive* choice of court clause, provided that other Contracting State has also made a similar declaration.[43] This allows for a group of like-minded Contracting States to allow for reciprocal enforcement of judgments where the choice of court clauses technically falls outside the jurisdictional provisions of the Convention because they are not exclusive choice of court clauses. The private international law of Singapore already allows for the recognition and enforcement of foreign judgments where the parties have chosen the foreign court in a non-exclusive choice of court clause. However, this extension will expand the scope of enforcement to non-monetary judgments. To the extent that other Contracting States also make this

38 Article 6(d). No choice of law rule is specified. Presumably hope has been pinned on harmonised approaches being adopted by Contracting States.

39 Article 6(e).

40 Article 8.

41 Article 9.

42 Article 11.

43 Article 22. The EU, US and Mexico have not made this declaration.

declaration, a declaration to this effect can widen the scope of enforceability of Singapore judgments.[44]

VII. Key Differences between the Convention Scheme and the Common Law

A. Whether a Choice of Court Agreement is Exclusive

49 One key point of departure from the common law is that the Convention *presumes* a choice of court agreement to be exclusive unless expressly provided otherwise by the parties. In contrast, while the common law does not require the word "exclusive" to be present to construe a choice of court agreement as exclusive, there is no presumption either way; it is a question of construction of contract according to the proper law of the agreement. A further significant distinction is that unilaterally exclusive choice of court agreements in the common law are not regarded as exclusive under the Convention because the exclusivity is not mutual.[45] A third point of distinction is that while the common law court will recognise a clause stipulating litigation in either X or Y and not anywhere else as having the same force of an exclusive foreign choice of court agreement because the parties had promised not to sue in the forum, this clause will not be an exclusive choice of court agreement under the Convention because it designates more than one court as the venue for dispute resolution.

B. Validity and Scope of Choice of Court Clause

50 The common law refers to the proper law of the choice of court agreement for these issues. The Convention refers the issue of validity to the law of the chosen court, including its choice of law rules. It is silent on the law governing the interpretation of the scope of the clause, but it is likely that the same law that governs validity would also govern interpretation. If the chosen court is a common law country, then the result is likely to be the same, as its relevant choice of law rules are likely to be the same as Singapore's. Civil law countries, however, tend to look at choice of court clauses not as contractual agreements but as a matter of international civil procedure, and tend to apply their own law to such questions. However, it is a matter of some speculation to

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44 Recognition and enforcement in Article 22 are not expressly subject to the defences in Article 9, but the reference in Article 22(2) to recognition and enforcement "under this Convention" presumably requires the application of Articles 8 and 9. Article 22 does not apply to a judgment from the court of a Contracting State if there is a judgment from or pending proceedings in respect of the same cause of action in another court where the proceedings were started in accordance with the non-exclusive choice of court agreement before the proceedings leading to the judgment sought to be recognised or enforced. It appears to be fairly easy to frustrate the operation of Article 22. However, such a judgment could still have effect under the common law.

45 Described as "asymmetric agreements" in the Explanatory Report, note 2 above, para 105.

what extent the modern civil law attitude may be changing in the light of a recent decision from the highest court in Spain awarding contractual damages for the breach of a choice of court clause. The Convention position is defensible in the context of its objective: if the rules of the Convention are designed to get the chosen court to hear the case, then it makes sense for the chosen court to have the decisive word on the validity and scope of the clause.

C. Exclusive Choice of Singapore Court

51 Under the common law, the court nevertheless retains a discretion to stay proceedings nevertheless, though in practice it is rarely exercised in England, and has never been exercised in Singapore in any reported case. Under the Convention, there is no such discretion. In highly complex litigation spanning different jurisdictions involving parties some of whom are party to the choice of court agreement and some not, this could lead to fragmentation of proceedings. For example, the House of Lords had refused to give effect to an exclusive choice of English court clause so that all issues between all parties could be tried in a single (foreign) forum.[46] Similarly, if the Singapore is faced with an exclusive choice of forum court clause and litigation is taking place in a foreign country (whether Contracting State or not) which has a strong national interest or public policy in taking jurisdiction in the case,[47] it would not have any flexibility under the Convention which it would have under the common law.

D. Exclusive Choice of Foreign Court

52 In this context, the differences generally appear to be of degree rather than kind. The common law will also not give effect to the choice of court agreement in paras 0(b) i (invalidity), ii (incapacity), and iii (public policy) as a matter of law, and is likely to exercise its discretion not to give effect to the clause in paras 0(b) (iii) (manifest injustice), (iv) (exceptional circumstances) and (v) (chosen court declined jurisdiction). The common law "exceptional circumstances amounting to strong cause" test is linguistically similar to the Convention's "for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed",[48] but it should be cautioned that the phrase in the Convention is intended to have an *autonomous* meaning.[49] Although there is no supra-national court to determine its meaning conclusively, the interpretation of such conventions require the domestic courts to have

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46 *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425 (HL).

47 In *OT Africa Ltd v Magic Sportswear Corp* [2005] EWCA 710, [2005] 2 Lloyd's Rep 170, the contest was between the contractual choice of the English forum and the mandatory statutory jurisdiction of Canada. On its facts, this was a carriage of goods case which would not have been subject to the Convention anyway.

48 Compare with the statement on choice of court clauses that "contracts freely entered into must be upheld and given full effect unless their enforcement would be unreasonable and unjust": *The Asian Plutus* [1990] 1 SLR(R) 504 at para [9].

49 ie, the meaning is not defined by any domestic law but as a matter of interpretation of the Convention.

regard to interpretations by courts in other contracting states, and it may lead to a standard that is less flexible than the common law standard. The Explanatory Report, which suggests[50] a very high standard akin to frustration of an agreement (a test which the Singapore court used in the early 1990's[51] but subsequently modified to be less stringent[52]), is intended to influence the interpretation by courts of contracting states. It is also not clear, however, how the common law waiver of agreement fits – if at all – into the Convention scheme, given the high thresholds suggested for "manifest injustice" as well as "exceptional reasons". Insofar as the waiver would render the clause unenforceable[53] under the law applied by the chosen court, the situation may fall under one of invalidity. Alternatively, it may be seen as a matter of procedure governed by the law of the forum.[54]

E. International Jurisdiction in Foreign Judgments

53 Under the common law, international jurisdiction is determined by the law of the court where the recognition or enforcement of the foreign judgment is sought. Hence, a Singapore court will apply its own choice of law rules to determine whether the parties have agreed to submit to the jurisdiction of the foreign court. The foreign court's finding on this issue cannot be determinative because the prior question of its recognition must first be answered with reference to the law of the forum.

54 On the other hand, under the Convention, the validity of an agreement to submit to the jurisdiction of the chosen court must be tested by the law of the state of the chosen court, and a finding of validity by such a court is conclusive on the issue.[55] This safeguard of international jurisdiction under the common law is thus replaced by the mutuality of treatment of a similar judgment from the Singapore court in another Contracting State.

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50 Explanatory Report, note 2 above, at para [154].

51 *The Vishva Apurva* [1992] 2 SLR 175 (CA); *The Humulesti* [1991] SGHC 161.

52 *The Eastern Trust* [1994] 2 SLR 526; *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR 6 (CA); *The Hyundai Fortune* [2004] 4 SLR 548 (CA).

53 The phrase "null and void" in Article 5(1) has an autonomous meaning under the Convention, so its meaning and scope are unclear.

54 But *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 signals a more restrictive approach towards the private international law meaning of "procedure" in Singapore common law.

55 Article 9(a). It may be argued that the choice of court agreement did not *exist* in the first place. However, the chosen court's finding of jurisdictional facts will be binding unless the judgment was given by default: Article 8(2).

F. Non-monetary Foreign Judgments

55 Unlike in the case of the common law,[56] under the Convention, a non-monetary foreign judgment from a chosen court may be directly enforced in Singapore. This, however, may not be as substantial a distinction as it first looks. For example, a foreign judgment from a chosen court ordering specific performance could be directly enforced under the Convention. But under the common law, it could be used to create an issue estoppel on the validity and enforceability of the underlying contractual obligation, and the judgment creditor could then sue for specific performance in the Singapore court on that basis.

VIII. Some Issues of Scope and Application

A. Uniform Interpretation

56 The Convention directs that state courts applying the Convention should pay regard to the international character of the Convention and the need to promote uniformity in its application.[57] There is ultimately no real control over how different countries may approach the Convention as there is no supranational appellate body.

B. Disputes as to Chosen Court

57 The Convention assumes that there is no dispute as to the identity of the chosen court. There may be cases where the court is not expressly identified by mentioned by reference to other facts (eg, location of a business) which could be the subject of a dispute between the contracting parties. There may be cases where there is a dispute as to which of several choice of court clauses the parties have actually incorporated into their agreement. If each of the courts of two Contracting States takes the respective view that the parties have chosen its own court, the Convention does not provide any solution for this contest of jurisdiction. It is also silent on whether the court of a Contracting State can issue an anti-suit injunction to protect the parties' choice of what it perceives as its own court.

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56 Singapore, like most common law countries, will only enforce money judgments: *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129. A small number of common law jurisdictions have moved towards the enforcement of non-monetary judgments from foreign countries: *Pro Swing Inc v Elta Golf Inc* (2006) SCC 52 (Supreme Court, Canada); *The Brunei Investment Agency and Bandone Sdn Bhd v Fidelis Nominees Ltd* [2008] JRC 152 (Royal Court, Jersey).

57 Article 23.

C. Mutability of Chosen Court

58 The Convention appears to be premised on the chosen court being constant. There may be cases where one party is given the unilateral power to change the chosen venue for dispute resolution (a "floating" choice of court clause which is valid under the common law[58]). It is not clear whether this type of choice of court clause falls within the scope of the Convention.

D. Relationship with the RECJA and REFJA

59 If Singapore becomes a Contracting State, and a country to which one of these statutes applies is also a Contracting State, then presumably the Convention will have to take precedence as it involves an obligation of Singapore to apply it. In contrast, the gazetting in RECJA and REFJA are based on ministerial decisions. The Convention will not supersede the RECJA and REFJA entirely as there will be non-Convention situations (eg, non-exclusive jurisdiction clauses, and where the judgment debtor was resident in the foreign jurisdiction) and judgments on non-Convention matters (eg, lump sum maintenance orders) which may continue to fall within the existing statutory regimes. Consequential amendments will, however, be required to bring the RECJA and REFJA into line with the Convention.

E. Interface between Convention and National Law

60 The Convention does not apply to all issues arising from choice of court agreements falling within its ambit. It is unclear whether the attributes of a choice of court clause falling within the ambit of the Convention will persist for the purpose of the application of the common law for issues falling outside the Convention. For example, a choice of court clause which would be interpreted as non-exclusive under the common law (in accordance with the proper law of the contract) is deemed to be exclusive under the Convention. This clause also purports to bring interim measures within its scope. For the purpose of determining the appropriateness of jurisdiction for interim measures under common law, is the clause to be taken to be exclusive (as determined for the purpose of the Convention) or non-exclusive (as determined under the common law)? The same issue arises if one party is claiming damages for breach of a choice of court clause, or an anti-suit injunction to prevent a breach of contract (matters not covered under the Convention), that the breach of a choice of court agreement provides a defence to the recognition or enforcement of a foreign judgment. There are strong arguments against a "schizophrenic" choice of court clause. On the other hand, if the meaning of clause under the Convention is taken to be determinative, then the Convention has wider implications beyond matters which are actually within its ambit.

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58 *The Star Texas* [1993] 2 Lloyd's Rep 445

F. Possible Residual Application of National Law

61 If a non-chosen court of a Contracting State stays the proceedings under the Convention then that would be the end of the matter. However, if the court applies the Convention but decides to hear the case, can the defendant argue that the proceedings should be stayed under the common law? Similarly, if a judgment from a chosen court of a Contracting States is refused recognition because a defence under the Convention applies, can the judgment creditor try its luck to get the judgment recognised under the common law? The Convention is silent on these issues.

IX. Policy Considerations

62 The Convention scheme is essentially similar to the common law structure for giving effect to party autonomy, so that the scheme is highly comprehensible to common lawyers. However, there are costs involved in the adoption of the Convention which need to be weighed against the potential gains. The direct costs are:

(a) the costs of educating lawyers about the distinction between Convention and the common law (especially the Convention meaning of "exclusive");

(b) complexity costs of maintaining dual regimes for the enforcement of choice of court clauses and the recognition and enforcement of the resulting judicial orders;

(c) uncertainty costs as a number of provisions of the Convention need to receive interpretative clarification; and

(d) the loss of some judicial flexibility to override an exclusive choice of court agreement in appropriate circumstances.[59]

63 Businesses clearly stand to gain from greater certainty in the enforcement of exclusive choice of court agreements and a wider scope for the recognition and enforceability of the resulting judgments. Multinational businesses also stand to gain from lower transaction costs due to harmonisation of legal regimes. Some further gains may also be realised at the enforcement stage since a qualifying Convention judgment

59 There are concerns that the Convention does not give sufficient space for public interest considerations: Mary Keyes, "Jurisdiction under the Hague Choice of Courts Convention; Its Likely Impact on Australian Practice" (2009) 5 Journal of Private International Law 181.

becomes enforceable automatically without the need to start an enforcement action (as in the case of the common law).[60]

64 However, there may be some business costs too. The Convention has been criticised for its over-emphasis on party autonomy at the expense of protecting weaker parties.[61] The Convention does not apply to consumer and employment contracts (where the more flexible common law standards continue to apply), and it is arguable that commercial parties can take care of themselves and it is generally fine to subject them to a more strict regime of enforcement of choice of court agreements.[62] There may, however, still be some concern about small and medium enterprises and their relatively weak bargaining power when dealing with multinational corporations, state enterprises, or governments; though this may be ameliorated to some extent by the applicable substantive principles of contract law applicable to the choice of court clause. For example, a choice of court clause could amount to an exclusion or limitation of liability clause under some laws. The large commercial area of carriage of goods, where there is systemic risk of parties being caught by surprise by choice of court clauses because of statutorily imposed contracts (bills of lading) and sub-bailment relationships, is excluded from the scope of the convention. Moreover, general imbalance of bargaining power has been found to be acceptable as a systemic risk in the common law and international arbitration context. The Unfair Contract Terms Act of Singapore exempts arbitration but not choice of court clauses from its scope.[63]

65 From the national perspective, the greatest potential gain lies in the wider enforceability of Singapore judgments and the facilitation of enforcement of such judgments in other Contracting States which otherwise would not recognise or enforce such a Singapore judgment under their own private international law. It is noted that experience in international arbitration has shown that some jurisdictions have been more co-operative than others. A similar experience is to be expected in the operation of this Convention.[64] However, there may be net gain and little marginal cost to Singapore arising from mutuality of recognition and enforcement of judgments, since Singapore's private international law already recognises foreign judgments where the parties have agreed to submit to the jurisdiction of the foreign court, and defences under the Convention are broadly similar to existing Singapore law. At this stage, any substantial benefit to Singapore is not to be obtained from its becoming party to the

60 One cannot make too much of this as enforceability may be challenged in further litigation.

61 Christian Schulze, "The 2005 Hague Convention on Choice of Court Agreements" (2007) 19 South African Mercantile Law Journal 140.

62 Burkhard Hess, "The Draft Hague Convention on Choice of Court Agreements" in Arnaud Nuyt and Nadine Watté (eds), *International Civil Litigation in Europe and Relations with Third States* (Brussels: Bruylant 2005) 263 at 278.

63 Note 10 above, section 13(2).

64 Richard Garnett, "The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing?" (2009) 5 Journal of Private International Law 161 points out the danger of a non-chosen court of a Contracting State taking an expansive view of its own mandatory rules to override the exclusive choice of court clause.

Convention as such but from other countries which would not otherwise recognise Singapore judgments becoming parties. This consideration may not be limited to the major trading partners of Singapore as such, since foreign contracting parties may be more inclined to choose Singapore as a neutral litigation forum if the resulting judgment can be enforced more widely against the assets of the judgment debtor wherever they may be found.[65] If the objective is to attract more cross-border commercial litigation arising from regional transactions, substantial benefits will really accrue from more Asian countries adopting the Convention.[66]

66 Adopting the Convention could be seen as a manifestation of Singapore's commitment to be a global player in facilitating international commerce. It can provide the Singapore courts with further opportunities to contribute to the development of an international jurisprudence on the interpretation of the Convention, similar to what it is doing in the sphere of international commercial arbitration. Unlike the case of the United Nations Convention on the International Sale of Goods (Vienna Convention) where contracting parties frequently opt out of the Convention (with the result that no case has ever come before the Singapore court), the Hague Convention on Choice of Court Agreements has no opt-out provision, and commercial parties (who prefer litigation as their mode of dispute resolution) are likely to continue to use exclusive choice of court clauses in their contracts.

67 On the other hand, it is arguable that because the Convention makes it more difficult to displace the exclusive choice of court clause, Singapore may be losing judicial business to other courts. This needs to be balanced against the value of certainty of the choice of court clause to the parties, as well as the value of a judicial reputation for enforcing parties' agreements. There is also a countervailing consideration that other Contracting States also have to give equal force to exclusive

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65 The key consideration in enforcement of judgments is the location of the assets of the judgment debtor, which in this globalised age may not coincide with its place of business. However, the place of business is likely to remain significant because of potential availability of execution measures like attachment or garnishment of debts.

66 Gains from existing signatory states will be found in the additional scope of enforceability of Singapore judgments in some parts of Europe. Recognition and enforcement of foreign country (money) judgments is a state matter in the United States. Most states will enforce foreign country judgments where the foreign court has exercised competent jurisdiction and subject to conditions familiar to those in the common law, but some additionally require reciprocity: Symeon C Symeonides, *American Private international Law* (Kluwer, 2008), paras 725-767. Since Singapore will enforce a foreign judgment where there is a valid choice of court foreign court clause, reciprocity does not appear to be an obstacle. Mexico enforces foreign judgments where the parties have chosen the relevant court, provided the choice is not exclusively one-sided and does not amount to denial of justice: Federal Code of Civil Procedure, Articles 566-567; Jorges A Vargas, "Conflict of Laws in Mexico as Governed by the Rules of the Federal Code of Civil Procedure", available at: http://ssrn.com/abstract=977242 (accessed on 23 March 2013). Enforcement of foreign judgments in EU states outside the scope of European treaties is a complex subject: see Samuel P. Baumgartner and Gerhard Walter, *Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions*, 3 *Civil Procedure in Europe: Recognition & Enforcement* (Gerhard Walter & Samuel P. Baumgartner (eds)), (Kluwer, 2000) and Mikael Berglund, *Cross Border Enforcement of Claims in the EU: History, Present Time and Future* (Kluwer, 2009), at para 4.2.1. Some will not recognise foreign judgments absent treaty obligations, while others have rules for the enforcement of foreign judgments. Some, like Spain and Germany, require reciprocity.

choice of Singapore court clauses. So long as Singapore remains attractive as a venue for choice of court clauses in transnational commercial contracts, it stands to gain from the mutual enforcement of choice of court clauses. The gain is potentially reinforced by the presumption of exclusivity of such clauses.

68 There could also be potential loss of business in the arbitration sphere if contracting parties see that it is more advantageous to bring their dispute to a court of law. However, this must be seen in the context of presenting parties with viable options so that they can make an informed choice, and the potential overall addition of business to the legal arena in Singapore. There is a further argument from the perspective of the development of Singapore law to attract more complex international commercial disputes into its courts.

69 There is also some concern that foreign lawyers will not be motivated to advise their clients to choose Singapore courts unless these lawyers also have a right of audience in the courts. If permitted, this could result in substantial Singapore judicial resources being utilised by foreign lawyers for essentially foreign litigation, although arguably there are also potential gains for the local legal profession as members gain greater experience in and exposure to complex cross-border commercial litigation as a result.

X. Conclusion

70 There are clearly potential gains from adopting the Convention, but there are also costs involved. The prevailing view in the Law Reform Committee was that adopting the Convention does not bring significant practical benefits to Singapore at least for the moment, and it recommended a wait and see attitude instead.